United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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To be argued by
MICHAEL AMBROSIO

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

C.D.R. ENTERPRISES LTD.,

Plaintiff-Appellant,

—against—

HARRISON J. GOLDIN, individually, and as Comptroller of the City of New York,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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Preliminary Statement

This civil rights action was commenced by an order to show cause which sought a declaratory judgment that enforcement of §220-b(2) of the New York Labor Law denied the plaintiff due process and equal protection, and a preliminary injunction restraining further enforcement of the statute.

In a memorandum dated April 14, 1975, the Hon. Lloyd MacMahon, United States District Judge for the Southern District of New York, denied plaintiff's motion for a preliminary injunction; denied plaintiff's application to convene a three-judge court because the constitutional attack on §220-b(2) was frivolous and insubstantial; granted the defendant's motion to dismiss the complaint, and dismissed the amended complaint *sua sponte*.

Question Presented

Was plaintiff's constitutional attack upon §220-b(2) of the New York Labor Law so insubstantial as to warrant denial of his application for a three-judge court and dismissal of his complaint?

The District Court answered this question in the affirmative.

The Facts

On July 22, 1974, several employees of the plaintiff, C.D.R. Enterprises Ltd. (hereinafter "CDR"), a firm which held contracts to perform work for the Board of Education of the City of New York, complained to the Office of the Comptroller that they had not been paid the "prevailing rate of wages" as required by CDR's contracts with the Board* and by §220 of the New York Labor Law (37**).

Pursuant to the provisions of §220-b(2) of the New York Labor Law, quoted in full *infra* at page 9, the Comptroller assigned a member of his staff to investigate the complaint (37). The investigator visited the school where CDR was performing work and examined the custodian's log book. The books and records of CDR were subpoenaed, and an audit was prepared which indicated that CDR had

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* Article 63 of the plaintiff's contract requires him to pay the prevailing rate of wage as defined in §220 of the Labor Law, and as fixed by the Comptroller. Failure to pay such wage constitutes a material breach of the contract entitling the Board of Education to liquidated damages in a sum equal to the amount of any underpayment of wages due to CDR's employees and to cancellation of the contract (41-43).

** Numerals in parentheses refer to pages in the appellant's appendix.

failed to pay the prevailing rate of wages, thereby breaching Article 63 of its contract and §220 of the Labor Law.

On October 11, 1974, CDR was charged with violating the Labor Law and a hearing pursuant to §220-b(2) was scheduled for October 31, 1974. In the interim, however, additional information was received by the defendant which indicated that CDR had failed to pay its employees over $26,500. On November 4, 1974, a new notice was sent to the plaintiff re-scheduling the hearing for November 13, 1974. On November 7, 1974, the Comptroller, acting pursuant to §220-b(2), stopped payment to CDR of $10,207.39 which would have been due to CDR for work performed on its contracts with the Board of Education (38).

On November 13, 1974, the hearing was adjourned at plaintiff's request to December 3, 1974. On that date a hearing was held and CDR requested that the hearing officer release the $10,207.39, which was being held by the Comptroller, and accept in its place a surety bond. The hearing officer denied CDR's application and the hearing was adjourned to December 6, 1974 (15). On that date it became apparent that CDR had not complied with the terms of a previously issued *subpoena duces tecum* and had refused to turn over all of its books to the defendant for examination. The plaintiff refused to obey the hearing officer's direction to turn over the books and the proceeding was adjourned *sine die* to permit the defendant to petition the state courts for enforcement of the subpoena (56-58).*

* Although the record is silent regarding the subsequent course of the administrative hearings, our investigation indicates that a proceeding to compel compliance with the subpoena was commenced in January, 1975, in the state courts. Thereafter, it was

On December 10, 1974, CDR commenced the instant proceeding by applying to the United States District Court for the Southern District of New York for an order to show cause why a preliminary injunction should not be granted to restrain defendant from withholding $10,207.39, provided plaintiff files a surety bond, on the ground that §220-b(2) of the New York Labor Law violates §1 of the 14th Amendment and is unconstitutional because it authorizes the withholding of such sum without providing for the filing of a surety bond to replace the money withheld (29). The order to show cause also sought an order, pursuant to 28 U.S.C. §2281 and §2284, directing that a three-judge court be convened. The defendant cross-moved to dismiss (3).

On April 14, 1975, Judge MacMahon, ordered that defendant's cross-motion to dismiss be granted, and the plaintiff's motion for a preliminary injunction and for the convening of a three-judge court be denied because CDR's attack on §220-b(2) was frivolous and insubstantial. On the court's own motion, it dismissed plaintiff's amended complaint.

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discovered that the subpoena had not been properly served upon CDR, and the proceeding was discontinued.

A new subpoena was issued and the same dispute arose at a March, 1975, session of the administrative hearing. Once again a proceeding to compel compliance was instituted. On April 30, 1975, pursuant to an agreement between the parties, CDR produced its records, which were marked into evidence. The second compliance proceeding was discontinued, and the administrative hearing was reconvened. Testimony has been taken on several occasions since April 30, 1975.

Decision Below

This is a civil rights action by C.D.R. Enterprises Ltd. ("C.D.R."), under 42 U.S.C. §1983, for (1) a declaratory judgment that enforcement of §220-b(2) of the New York Labor Law (McKinney Supp. 1975) by defendant denies due process and equal protection, and (2) a permanent injunction restraining further enforcement of that statute. Plaintiff now moves for a preliminary injunction, pursuant to Rule 65, Fed. R. Civ. P., and for the convening of a three-judge court, pursuant to 28 U.S.C. §§2282 and 2284. Defendant cross-moves to dismiss the complaint, pursuant to Rule 12(b), Fed. R. Civ. P., for lack of jurisdiction over the subject matter.

Plaintiff, a painting contractor, entered into several contracts with the City of New York for painting its buildings. Each contract incorporated a provision of N. Y. Labor Law §220-b(2), requiring an employer to pay the prevailing rate of wages to its employees working on public projects. The cited section of the statute further provides that when employees make formal complaints that they are not being paid the prevailing wage, the financial officer in charge can withhold the disputed wages from payment under the contract pending the outcome of an investigation and hearing by the financial officer. The financial officer has the adjunct power during an investigation and hearing to issue subpoenas, administer oaths and examine witnesses. Once the financial officer renders his decision, the employer has the right to bring an Article 78 proceeding under the New York Civil Practice Law and Rules to review the decision.

On July 22, 1974, several of plaintiff's employees working on the city projects under the contracts reported to the Comptroller of the City of New York, the financial officer in charge, that C.D.R. was not paying them the prevailing rate of wages. After an investigation, defendant Comptroller found that there was evidence that C.D.R. had underpaid its employees by $10,207.39, and on November 7, 1974 he stopped payment to C.D.R. in that amount pending a hearing and determination of the dispute.[1]

During a hearing on December 6, 1974, the hearing officer of the Comptroller's office requested C.D.R. to produce records of wage payments which were the subject of the controversy in order to assist him in his determination. C.D.R., however, refused to produce the records and the Comptroller has, therefore, been unable to render a final decision in the matter.

Plaintiff contends that its right to procedural due process is being denied because §220-b(2) does not provide the employer with the alternative of receiving the money due under the contracts and posting a surety bond to cover the disputed wages pending a determination of the controversy. Plaintiff also claims to suffer irreparable harm because §220-b(2) deprives it of money needed to pay operating expenses and destroys its credit. In an amended complaint, plaintiff alleges that §220-b(2) violates its equal protection under the law.

We cannot consider defendant's Rule 12(b) motion if a three-judge court is appropriate.[2] We, therefore, turn

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[1] On January 3, 1975, the Comptroller stopped payment on an additional $4,601.70, bringing the total amount subject to the stop payment order to $14,809.09.

[2] *Idlewild Liquor Corp.* v. *Epstein,* 370 U.S. 713 (1962).

first to plaintiff's application for that relief under 28 U.S.C. §2281.

Plaintiff attacks the constitutionality of a state statute and seeks to enjoin its enforcement. A three-judge court is, therefore, appropriate if plaintiff raises a substantial constitutional question.[3]

In *Goosby* v. *Osser,* 409 U.S. 512 (1973), the Supreme Court recently outlined the standard for determining the substantiality of a constitutional claim. "A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" 409 U.S. at 518.

In *Bourjois, Inc.* v. *Chapman,* 301 U.S. 183, 189 (1937), the Supreme Court was faced with a similar due process claim. There, plaintiff challenged as violative of due process a Maine statute which required the registration of cosmetic preparations by manufacturers or proprietors and empowered a state agency to issue or deny, under described standards, certificates of registration of such preparations. The Court concluded that the Constitution did not require that "there must be a hearing of the applicant before the board may exercise a judgment under the circumstances and of the character here involved" and that "the requirement of due process of law is amply safeguarded by §2 of the statute" providing for judicial review.

The established facts of the present action are that the hearings concerning whether plaintiff paid the prevailing rate of wages have not been completed due to plaintiff's

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[3] *Idlewild Liquor Corp.* v. *Epstein, supra.*

refusal to supply the hearing officer with records of its wage payments. Once plaintiff supplies those records, the Comptroller will be able to render his decision. Plaintiff will then be entitled to proceed in the state courts for judicial review of the Comptroller's decision.

In *F. S. Royster Guano* v. *Virginia*, 253 U.S. 412 (1920), the Supreme Court stated that a state statute violates equal protection when it grants to some what it denies to others, unless the deprivation is suffered as the result of the state's placing persons into different classes and such classification is reasonable.

Plaintiff has utterly failed to show that §220-b(2) grants something to other employers engaged in public contracts that it denies to plaintiff. In addition, construing plaintiff's claim to mean that the withholding procedure of §220-b(2) denies the class of employees engaged in public contracts equal protection, vis-a-vis employers not engaged in such contracts, we conclude that this classification is reasonable as it helps effectuate the public policy of New York that employees engaged in public projects be paid the prevailing rate of wages.

We conclude, therefore, that *Bourjois, Inc.* v. *Chapman, supra,* and *F. S. Royster Guano Co.* v. *Virginia, supra,* inescapably render C.D.R.'s attack on §220-b(2) frivolous and insubstantial, thus precluding the convening of a three-judge court.

Since it is essential to jurisdiction under 42 U.S.C. §1983 that a substantial federal question be presented, the complaint and amended complaint must be dismissed for lack of subject matter jurisdiction.[4]

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[4] *Hagans* v. *Lavine*, 415 U.S. 528 (1974); *Ex parte Poresky*, 290 U.S. 30 (1933); *Almenares* v. *Wyman*, 453 F.2d 1075 (2d Cir. 1971), *cert denied*, 405 U.S. 944 (1972).

Accordingly, plaintiff's motion for a preliminary injunction and for the convening of a three-judge court is denied. Defendant's cross-motion to dismiss the complaint is granted, and we dismiss the amended complaint *sua sponte*.

So ordered.

Statutes Involved

Labor Law

§220-b. *Amounts due for wages and supplements may be withheld for benefit of laborers*

* * * * *

2. When any interested person shall file a written complaint with the fiscal officer, as herein defined, alleging unpaid wages or supplements due for labor, performed on a public improvement for which a contract has been entered into, and said labor is alleged to have been performed within the three-year period immediately preceding the date of the filing of said complaint, or if, on the fiscal officer's own initiative, unpaid wages or supplements appear to be due, the fiscal officer shall immediately so notify the financial officer of the civil division interested, who shall withhold from any payment on account thereof, due the contractor or subcontractor executing said public improvement, sufficient moneys to satisfy said wages, and supplements, pending a final determination. The fiscal officer shall then cause an investigation to be made to determine whether any amounts are due to the laborers, workmen or mechanics, or on their respective behalves, on such public improvement, for labor performed after the commencement of the three-year period immediately preceding the filing of the complaint or the commencement of the investigation on his

own initiative, as the case may be, and shall order a hearing thereon at a time and place to be specified and shall give notice thereof, together with a copy of such complaint, or a statement of the facts disclosed upon such investigation, which notice shall be served personally or by mail on all interested persons, including the person complained against and upon the financial officer of the civil division interested; such person complained against shall have an opportunity to be heard in respect to the matters complained of, at the time and place specified in such notice, which time shall be not less than five days from the service of said notice. The fiscal officer in such an investigation shall be deemed to be acting in a judicial capacity and shall have the rights to issue subpoenas, administer oaths and examine witnesses. The enforcement of a subpoena issued under this section shall be regulated by the civil practice law and rules. Such investigation and hearing shall be expeditiously conducted, and upon such hearing and investigation, the fiscal officer shall determine the issues raised thereon and shall make and file an order in his office stating such determination and forthwith serve a copy of such order, either personally or by mail, together with notice of filing, upon the financial officer of the civil division interested, and the parties to such proceedings and, if the fiscal officer be the comptroller or other analogous officer of a city, upon the industrial commissioner. Upon the entry and service of such order, the financial officer of the civil division interested shall pay to the claimant, from the moneys due to the contractor or subcontractor, the amount of the claim as determined by the fiscal officer provided that no proceeding pursuant to article seventy-eight of the civil practice law and rules for review of said order is commenced by any party aggrieved thereby within thirty days from the date said order was filed in the office of the fiscal officer. In the event that such a proceeding for

review is instituted, moneys sufficient to satisfy the claim shall be set aside by the financial officer interested, subject to the order of the court.

Lien Law

§21. *Discharge of lien for public improvement*

A lien against the amount due or to become due a contractor from the state or a public corporation for the construction or demolition of a public improvement may be discharged as follows:

* * * * *

5. Either before or after the beginning of an action by a contractor or subcontractor executing an undertaking with two or more sufficient sureties, who shall be freeholders, to the state or the public corporation with which the notice of lien is filed, in such sums as the court or a judge or justice thereof may direct, not less than the amount claimed in the notice of lien, conditioned for the payment of any judgment which may be recovered in an action to enforce the lien. The sureties must together justify in at least double the sum named in the undertaking. A copy of the undertaking with notice that the sureties will justify before the court or a judge or justice thereof at the time and place therein mentioned must be served upon the lienor, not less than five days before such time. If the lienor cannot be found, such service may be made as prescribed in subdivision four of section nineteen of this article. Upon the approval of the undertaking by the court, judge or justice, an order shall be made discharging such lien. The execution of such undertaking by any fidelity or surety company authorized by the laws of this state to transact business shall be equivalent to the execution of such an undertaking

by two sureties, and where a certificate of qualification has been issued by the superintendent of insurance under the provisions of section three hundred and twenty-seven of the insurance law and has not been revoked, no justification or notice thereof shall be necessary, and in such case a copy of the undertaking and notice of the application for an order to discharge the lien must be served upon the lienor, or his attorney, not less than two days before such application for such order is made. Any such company may execute such undertaking as surety by the hand of its officers or attorney duly authorized thereto by resolution of its board of directors, a certified copy of which resolution under the seal of such company, shall be filed with each undertaking. Except as otherwise provided herein the provisions of article twenty-five of the civil practice law and rules regulating undertakings and of article eighteen of the justice court act are applicable to an undertaking given for the discharge of a lien on account of public improvements. If the lienor cannot be found or does not appear by attorney then such service may be made as prescribed in subdivision four of section nineteen of this chapter for the service of an undertaking with notice of justification of sureties.

ARGUMENT

The complaint was properly dismissed because the plaintiff's constitutional attack upon §220-b(2) of the New York Labor Law was plainly insubstantial.

(1)

Plaintiff sought a declaratory judgment that §220-b(2) of the New York Labor Law is unconstitutional because it fails to permit the plaintiff, a public contractor, to substitute a surety bond for the money which the Comptroller of the City of New York, defendant herein, is withholding to satisfy the claims of plaintiff's employees that they did not receive the prevailing rate of wages required by the Labor Law and Article 63 of plaintiff's contract. Plaintiff claims that the lack of a surety bond provision causes the statute to violate the due process and equal protection clauses of the 14th Amendment.

In its order to show cause which commenced this action, the plaintiff sought a preliminary injunction and the convening of a three-judge court pursuant to 28 U.S.C. §§2281 and 2284. The court below correctly noted that it must first decide whether plaintiff was entitled to a three-judge court before reaching the merits. *Idlewild Liquor Corp.* v. *Epstein,* 370 U.S. 713 (1962).

It has been repeatedly held that 28 U.S.C. §2281 does not require the convening of a three-judge court if the constitutional attack upon the state statute is insubstantial. *Ex parte Poresky,* 290 U.S. 30 (1933); *Idlewild Liquor Corp.* v. *Epstein,* 370 U.S. 713 (1963); *Goosby* v. *Osser,* 409 U.S. 512 (1973). The issue, then, is whether this plaintiff's constitutional attack is insubstantial. Despite recent criticism

of the three-judge court requirement in constitutional cases (see, Report of the Study Group on the Caseload of the Supreme Court, 28-30 (1972); Burger, The State of the Federal Judiciary—1972, 58 A.B.A.J. 1049, 1053 (1972)), the Supreme Court has defined the insubstantiality standard in narrow terms:

> "Constitutional insubstantiality for this purpose has been equated with such concepts as 'essentially fictitious,' *Bailey* v. *Patterson,* 369 U.S., at 33; 'wholly insubstantial,' *ibid.*; 'obviously frivolous' *Hannis Distilling Co.* v. *Baltimore,* 216 U.S. 285, 288 (1910); and 'obviously without merit,' *Ex parte Poresky,* 290 U.S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' *Ex parte Poresky, supra,* at 32, quoting from *Hannis Distilling Co.* v. *Baltimore, supra,* at 288; see also *Levering & Garrigues Co.* v. *Morrin,* 289 U.S. 103, 105-106 (1933); *McGilvra* v. *Ross,* 215 U.S. 70, 80 (1909)." *Goosby* v. *Osser,* 409 U.S. 512, 518 (1973).

Although this court has recognized that the standard is a severe one (see *Roe* v. *Ingraham,* 480 F.2d 102 (2nd

Cir., 1973)), it has not applied it with mechanical rigidity. An application for a three-judge court may still be denied in an appropriate case (see *Pordum* v. *Board of Regents,* 491 F.2d 1281 (2nd Cir., 1974)). We submit, and the court below found, that this is such an appropriate case in which to deny the application.*

(2)

In determining the substantiality of the plaintiff's constitutional attack it is necessary to consider the arguments which have been offered by the plaintiff to support its claim that §220-b(2) of the Labor Law is unconstitutional.

Plaintiff's first argument is that the provision of the statute which permits the Comptroller, without notice or hearing, to stop payment of funds, allegedly due to the plaintiff, deprives plaintiff of its property without due process of law in violation of the 14th Amendment. This argument, however, founders at the outset.

In evaluating a due process claim we must first determine the nature of the "property" interest at stake. Plaintiff claims that the defendant is withholding pursuant to §220-b(2) of the Labor Law approximately $10,000 to which the plaintiff is entitled. While defendant concedes that he has not paid the money to plaintiff, he points out that the plaintiff's claim to entitlement is premised upon a contract with

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* We note that the plaintiff's brief does not discuss the district court's denial of his application to convene a three-judge court. Indeed, at the conclusion of his brief (page 23) he fails to ask the court to direct that a three-judge court be convened. Instead, he asks that §220-b(2) be declared unconstitutional. Of course, if a three-judge court is appropriate in this case, this court is powerless to grant plaintiff the substantive relief he requests. *Stratton* v. *St. Louis S. W. Ry. Co.,* 282 U.S. 10 (1930).

the Board of Education. Plaintiff is entitled to payments pursuant to that contract in return for performance of work in accordance with the terms of that contract.

Plaintiff's contract with the Board of Education required him to pay his employees the prevailing rate of wages. Article 63 of the contract provides that if the plaintiff fails to pay the prevailing rate the Board may withhold from any amounts due to the plaintiff a sum equal to the amount of any underpayment of wages due to his employees.* The defendant has refused to pay the plaintiff the $10,000 which might otherwise be due because he has concluded after investigation that the plaintiff has materially breached the contract by failing to pay the prevailing wage.

Surely, this plaintiff cannot seriously claim that the defendant who believes that a contractual, as well as statutory, duty was breached by the plaintiff is, nevertheless, required by the 14th Amendment to continue to make payments on that contract. The defendant has only done what any party to a contract does when he believes it has been breached. He stopped performing and awaits a settlement of the dispute. If it should develop that the plaintiff has paid the prevailing wage to its employees, then the Board of Education may have breached the contract in failing to pay plaintiff what was its due. However, a breach of contract by a municipality is no more a taking of property without due process than a breach of contract by any other person. *Shawnee Sewerage and Drainage Co.* v. *Stearns,* 220 U.S. 462 (1911); *McCormick* v. *Oklahoma City,* 236 U.S. 657 (1915); *Manila Investment Co.* v. *Trammell,* 239 U.S. 31 (1915). Until a settlement of the dispute,

* The Board could, but apparently did not, also choose to cancel the contract because of plaintiff's breach.

whether by negotiation or adjudication, this plaintiff has no property right to the $10,000. All it has is a cause of action for alleged breach of contract.

For this reason, we submit, the plaintiff's claim that defendant's refusal to pay him $10,000, without first holding a hearing, deprives him of his "property" without due process of law is patently unmeritorious. Plaintiff has no "property" interest in the $10,000 which is protected by the constitution.

(3)

Assuming, without conceding, that plaintiff has a "property" interest in the $10,000, did the defendant's refusal to pay this money, without first conducting a hearing, constitute a taking of property without due process of law? We submit that it did not.

Defendant stopped payment to plaintiff on November 7, 1974, after conducting a lengthy investigation of the complaints of plaintiff's employees that they were not receiving the prevailing rate of wages. On November 13, 1974, a hearing was commenced to determine whether plaintiff had paid the prevailing wage.* At the conclusion of this hearing, the plaintiff is entitled under §220-b(2) to seek judicial review in an Article 78 proceeding.

> "The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability

* The court below found (7) that the administrative hearing was delayed and prolonged by plaintiff's refusal to produce his books and records in compliance with a *subpoena duces tecum* issued by the hearing officer pursuant to §220-b(2).

is adequate.' *Phillips* v. *Commissioner,* 283 U.S. 589, 596-597 (1931)." *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600, 611 (1974). See also, *Bourjois* v. *Chapman,* 301 U.S. 183 (1936).

Plaintiff, however, appears to assert that the usual rule should not apply in this case because, according to plaintiff, it is analogous to *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). In that case, the Supreme Court held unconstitutional provisions of Florida and Pennsylvania laws which permitted a creditor to secure, without notice or hearing, a writ of replevin for the return of goods held by his debtor pursuant to an installment loan contract.

By no stretch of the imagination is this case the *Fuentes* v. *Shevin* case. First, as plaintiff itself recognizes, its role here is not that of a debtor—rather, it claims to be a creditor. Second, and more fundamentally, there has been here no interference with possession. This plaintiff, unlike the plaintiffs in *Fuentes,* never had possession of the property at issue. All it had was a claim to possession, and a contested claim at that.

Moreover, even if this plaintiff had a constitutionally protected property interest, which it does not, and even if this defendant had seized plaintiff's property, which it did not, the provisions of §220-b(2) would still pass constitutional muster. In *Fuentes,* the Supreme Court recognized that immediate seizure of a property interest, without an opportunity for a prior hearing, is constitutionally permissible if (1) the seizure is to secure an important governmental interest; (2) there is a need for prompt action and; (3) the government has kept strict control over its monopoly of legitimate force (*Fuentes* v. *Shevin,* 407 U.S.,

at 91). We submit that these three criteria are met by the statute under attack here.

First, §220 *et seq.* of the Labor Law expresses a legislative determination to require persons who hold government contracts to pay the prevailing rates of wages to their employees. This mandate is intended for the direct benefit of the workman and the indirect benefit of the State. *Fata* v. *Healy Co.*, 289 N.Y. 401 (1943). It cannot be seriously questioned that the maintenance of decent wages is an important governmental interest.

Second, to insure that its workmen are paid the prevailing rate of wages, the state has empowered the defendant to stop payment to contractors whose employees allege that they have not been paid the prevailing rate of wages.* The state has permitted this *ex parte* action by the defendant in order to insure its workmen of a fund from which they can be paid in the event that a final determination is made that their employer has failed to pay them the prevailing rate. Absent this fund, the workmen might find that after a final determination in their favor there is no way to collect their wages from the employer. To prevent its workmen from having to resort to the courts to enforce a final determination against an employer who may have become judgment-proof in the interim, the state has authorized

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* Although §220-b(2) appears to require the defendant immediately to stop payment to contractors whose workmen have complained, the defendant first conducts an investigation of the complaint before acting. In this case almost four months were spent examining the complaint before the stop-payment order was issued.

The legislative history of §220-b(2) clearly indicates that the Comptroller has the power to exercise discretion in deciding whether and when a stop-payment order should be issued. See, Memoranda of State Labor Department, New York Legislative Annual, 1966, pages 241-242.

the Comptroller to take prompt action to insure that a fund will be available to pay workmen who have not received the prevailing rate of wages.

Third, unlike the situation in *Fuentes,* the "seizure" here was not initiated by self-interested parties. Compare *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974). §220-b(2) authorizes the Comptroller, a government officer, to stop payment and the Comptroller has exercised this power after making a four month inquiry which included the issuance of subpoenas and the preparation of an audit. The defendant has no personal interest in the final determination. Whether the plaintiff or his workman ultimately succeeds the defendant will have to pay the sum at issue here. His position is no more than that of a neutral stakeholder.

Even if this plaintiff has a constitutionally protected property interest in the sum at issue here, and even if the defendant may be viewed as having "seized" that "property", we, nevertheless, submit that the *ex parte* seizure was constitutionally permissible under the standards set forth in *Fuentes* v. *Shevin, supra,* because an important governmental interest was at stake; there was a need for prompt action to defend that interest; and the government strictly controlled the use of "legitimate force."

(4)

Plaintiff's final argument in support of his contention that §220-b(2) is unconstitutional is as insubstantial as its predecessors. Plaintiff contends that he is denied due process and equal protection of the law because §220-b(2) does not provide that a government contractor whose payments have been stopped may substitute a surety bond for the

amount being withheld. Clearly, §220-b(2) makes no provision for such a bond and a recent decision of the New York courts indicates that none will be implied. *Matter of Gottlieb Contracting, Inc.* (Sup. Ct., N.Y. Co.), 173 N.Y.L.J., Jan. 2, 1975, at p. 2, col. 1. We submit that such a provision is unnecessary because the procedure mandated by §220-b (2) does not deprive this plaintiff of the due process of law.

If the procedures mandated by §220-b(2), as written, are constitutional, as we have argued, then the courts are powerless to require additional procedures, however meritorious, which have not been authorized by the Legislature. If, on the other hand, the procedures mandated by §220-b (2) are unconstitutional then the addition of a provision allowing plaintiff to file a surety bond to secure the return of the money "seized" by the defendant, without notice or hearing, is unlikely to save the statute.

In *Fuentes* v. *Shevin,* 407 U.S. 67 (1971), the replevin statutes there under constitutional attack permitted the debtor to get back the property seized by the creditor by posting a surety bond. The Court, however, held that the seizure of the property without notice or hearing in advance was unconstitutional.

> "When officials . . . seize one piece of property from a person's possession and then agree to return it if he surrenders another, they deprive him of his property whether or not he has the funds, the knowledge, and the time needed to take advantage of the recovery provision." *Fuentes, supra,* at p. 85.

Clearly, then, the plaintiff's suggestion that §220-b(2) requires a surety bond provision to preserve it from invalidity upon due process grounds is constitutionally irrelevant.*

Plaintiff also contends, however, that §220-b(2) of the Labor Law denies him equal protection of the laws. He points to §21 of the New York Lien Law which permits a public contractor, whose employees have filed a lien upon money due to the contractor pursuant to a contract with a state or local government, to secure the release of the money by filing a surety bond in an amount fixed by a court. He notes, on the other hand, that §220-b(2) permits the Comptroller to stop payment of money due to a contractor without permitting the contractor to secure its release by filing a surety bond. According to the plaintiff, the state in permitting employees a choice of remedies to secure their wage claims has subjected the class of public contractors whose employees choose to proceed pursuant to §220-b(2) to an invidious discrimination.

Of course, the class which is the alleged victim of the discrimination was not created by the state but by the choice of the individual employee. Assuming, however, that the classification can be attributed to the state it must

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* Also irrelevant is the plaintiff's argument that the *subpoena duces tecum* issued by the hearing officer for the production of plaintiff's books is invalid. §220-b(2) gave the plaintiff a prompt opportunity for a hearing after payment was stopped. The hearing commenced only 6 days later. Subsequently, the plaintiff refused to comply with the hearing officer's direction to produce its records. The hearing officer thereupon adjourned the proceeding to afford the defendant an opportunity to enforce the subpoena. We submit that the plaintiff's argument should be made to the state courts and is not constitutionally significant. Furthermore, we believe his argument is erroneous as a matter of state law. See *Matter of Alexander* v. *New York State Comm.*, 306 N.Y. 421 (1954).

be sustained by the courts "unless it is 'patently arbitrary' and bears no relationship to a legitimate government interest." *Frontiero* v. *Richardson,* 411 U.S. 677, 681 (1973). The classification will be set aside "only if no grounds can be conceived to justify [it]." *McDonald* v. *Board of Education,* 394 U.S. 802 (1968).

The State of New York has enacted both §220-b(2) of the Labor Law and §21 of the Lien Law to protect the wages of its citizens who are employed by public contractors. This is certainly a legitimate governmental interest. The only question that remains to be answered is whether the state's decision to give the employees two methods of protecting their wages is patently arbitrary or irrational.

The Lien Law grants the employee of a public contractor a lien for unpaid wages (§5), and allows him to exercise the lien merely by filing a notice with the Comptroller (§12). Progress payments to the contractor will be withheld for the duration of the lien (§18). The employee, however, will have to foreclose the lien through court action which can be costly and time consuming. Under this statutory scheme the public contractor's progress payments can be stopped for a substantial period of time by the mere filing of the lien. Since there is no preliminary investigation by a court or governmental agency of the employee's claims, which may be wholly frivolous, the statute permits the contractor to secure his progress payments by filing a surety bond.

The Labor Law offers a different avenue of redress to an employee who has a wage claim against a public contractor. Instead of filing a lien which he will have to foreclose in a judicial proceeding, the employee is merely required to file

a complaint with the Comptroller. In the instant case, the Comptroller, who had no interest in the ultimate disposition of the claim, conducted a four month investigation before issuing a stop-payment order on plaintiff's contracts. During this four month period the plaintiff received whatever progress payments were due without having to bear the expense of a surety bond. Once the stop payment order was issued an expeditious hearing was provided.

The Legislature of this state could reasonably decide that a surety bond provision was unnecessary in the Labor Law because a preliminary investigation of the employee's claim is made by a disinterested government officer before the contractor's progress payments are stopped; because an expeditious hearing is provided the contractor whose progress payments are stopped; and because a surety bond provision would impose a further burden upon the Comptroller who has no direct interest in the ultimate outcome of the proceeding but who might have to bear the expense of enforcing the surety bond should the employee prove successful. For these reasons, we submit, the Legislature properly decided not to include a surety bond provision in the Labor Law. Whatever statutory "classification" may arise from the different statutory schemes contemplated by the Lien and Labor Laws is neither arbitrary nor irrational and does not deprive this plaintiff of the equal protection of the law.

(5)

Clearly then the constitutional arguments made by this plaintiff are insubstantial and do not warrant the convening of a three-judge court. Moreover, the plaintiff's cause of action is so patently insubstantial as to justify dismissal for want of jurisdiction.

CONCLUSION

The order appealed from should be affirmed.

Respectfully submitted,

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